LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 10 1967
JOHN F. DAVIS, CLERK

No. 177

IN THE

Supreme Court of the United States

October Term, 1967

R. C. WETHERALL, JR. AND PAUL PRICE

Appellants

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, and BURL A. SAWYERS, AS STATE ROAD COMMISSIONER,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS FOR LACK OF JURISDICTION

CARNEY M. LAYNE
638 Fifth Avenue
Huntington, West Virginia

CHARLES W. YEAGER
608 Kanawha Valley Building
Charleston, West Virginia

JAMES W. ST. CLAIR
523 Seventh Street
Huntington, West Virginia
Attorneys for Appellants

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

INDEX

	Page
STATEMENT OF THE CASE	1
ARGUMENT	
I. APPELLEES' CONTENTION OF ADEQUATE NON-FEDERAL GROUNDS IS FRIVOLOUS AND WITHOUT MERIT	2
II. THE POSSIBILITY OF A LEGISLATIVE GRATUITY IS NOT A REMEDY AND DOES NOT SATISFY THE REQUIREMENTS OF DUE PROCESS	4
CONCLUSION	6

CITATIONS

CASES	Page
Ickes v. *Fox*, 300 U.S. 82, 86	1
Staub v. *Baxley*, 355 U.S. 313	2
Sauffront v. *Compagnie Des Sucreries*, 217 U.S. 475	2
McArthur v. *Scott*, 113 U.S. 340, 386	2
Lawrence v. *State Tax Comm.*, 286 U.S. 276	2, 5
Wolfe v. *North Carolina*, 364 U.S. 177	2
N.A.A.C.P. v. *Alabama*, 357 U.S. 449	2
Abie State Bank v. *Bryan*, 282 U.S. 765	3
Enterprise Irr. Dist. v. *Farmers' Mutual Canal Co.*, 243 U.S. 157	3
Hamm v. *City of Rock Hill*, 379 U.S. 306	3
Hill v. *Florida*, 325 U.S. 538	3
Parden v. *Terminal Railway of Alabama State Docks Department*, 377 U.S. 184	3
Land v. *Dollar*, 330 U.S. 731, 738	5
STATE CONSTITUTIONAL PROVISION:	
Section 35, Article VI, Constitution of West Virginia	2
STATE STATUTE:	
Chapter 14, Article 2, Code of West Virginia, 1931, As Amended By Enrolled Senate Bill 332, Acts of West Virginia Legislature, 1967	4

No. 177

In The

Supreme Court of the United States

October Term, 1967

R. C. Wetherall, Jr. and Paul Price

Appellants

v.

The State Road Commission of West Virginia, a Corporation, and Buel A. Sawyers, as State Road Commissioner,

Appellees.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS FOR LACK OF JURISDICTION

STATEMENT OF THE CASE

The mandamus petition avers, and for jurisdictional purposes here as well as on the demurrer in the trial Court, it must be taken as true, *Ickes* v. *Fox*, 300 U.S. 82, 96, that by arbitrary action of the State Road Commissioner under color of office and without authority, the Road Commissioner, after paying Appellants for the dam construction by monthly estimate, upon its completion and acceptance, ignored the patent terms of the contract and wrongfully deducted such payments from money still acknowledgedly due for roadway construction, thereby appropriating Appellants' work, services, labor, and material of the value of $20,847.75 which were incorporated in the public dam for public use. The petition was to compel the Appellees to institute eminent domain proceedings to legally acquire and pay for Appellants' property. *The appropriation of*

Appellants' property for public use without compensation and without due process of law is the core of Appellants' petition. Appellees met Appellants' charges with a demurrer interposing as a bar the absolute immunity provision of Section 35, Article VI, of the State Constitution. *The trial Court applied the immunity provision to this case* and turned Appellants out of Court.

ARGUMENT

I

APPELLEES' CONTENTION OF ADEQUATE NON-FEDERAL GROUNDS IS FRIVOLOUS AND WITHOUT MERIT

As to Wetherall, Appellees rest this contention on the trial Court's holding that Wetherall was not a real party of interest because he was not a party to the contract, despite the fact he has 90% interest in the dam work and the compensation therefor, and alleged his property had been appropriated by the Road Commission in violation of his rights under the Fourteenth Amendment. Whether this ground is an adequate non-federal ground is a question of Federal law, and this Court is not concluded by the view taken by the state court. *Staub* v. *Baxley,* 355 U.S. 313. The situation of the parties is within the principle enunciated in *Sauffront* v. *La Compagnie Des Sucreries,* 217 U.S. 475, and *McArthur* v. *Scott,* 113 U.S. 340, 386, and in view thereof, Appellees' contention of adequate non-federal ground as to Wetherall is without any fair or substantial support. *Staub* v. *Baxley,* supra, *Lawrence* v. *State Tax Commission,* 286 U.S. 276, *Wolfe* v. *North Carolina,* 364 U.S. 177; *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449.

The petition alleges, and on Motion to Dismiss it must be taken as true, that Wetherall supervised the dam work and his compensation was tied directly to its payment by Appellees. Accordingly, the work being taken without

compensation was 90% Wetherall's property, *whether he was a contracting party or not.* After an objection on Federal grounds is raised, the jurisdiction of this Court is plain if the non-federal ground *is not of sufficient breadth to sustain the judgment without any decision on the federal ground. Abie State Bank* v. *Bryan*, 282 U.S. 765, *Enterprise Irr. Dist.* v. *Farmers' Mutual Canal Co.*, 243 U.S. 157. It is apparent that as to Wetherall it required decision on the Federal ground.

As to Price, Appellees rest their contention on the fact that the trial Court held this was not a proper "subject" for an eminent domain proceeding. However, such holding (Juris. Statement, Appendix D, Letter Opinion of Trial Court, dated March 11, 1966, p. 75a; and Appendix E, Letter Opinion of Trial Court, dated March 11, 1966, in *Price* v. *State Road Commission*, pp. 78a, 79a) is based upon, and the result of, the interposition of the state constitutional immunity provision, *the application of which to the facts of this case is the very Federal ground on which this appeal is taken.* This proceeding from its inception and on this appeal, has been focused on the clear conflict between Appellants' Federal constitutional rights and the application of the State constitutional immunity provision, the latter of which under the Supremacy Clause of Article VI, Clause 2, of the Federal Constitution, must give way. (*Hamm* v. *City of Rock Hill*, 379 U.S. 306; *Hill* v. *Florida*, 325 U.S. 538; *Parden* v. *Terminal Railway of Alabama State Docks Department*, 377 U.S. 184.

Appellees' contention begs the very question which Appellants seek to have determined. It ill becomes Appellees to challenge the propriety of the very remedy which it represented in the prior appeal to be proper and available. (Juris. Statement, Appendix B, Motion To Dismiss, pp. 67a, 68a). Constitutional rights are not so ephemeral as to be resolved by such trifling expediency.

II

THE POSSIBILITY OF A LEGISLATIVE GRATUITY IS NOT A REMEDY AND DOES NOT SATISFY THE REQUIREMENTS OF DUE PROCESS.

Appellees repudiated in the trial Court their representations to this Court on the prior appeal that this mandamus proceeding is an effective State remedy. They now have the temerity to come again in this Court and brazenly suggest that Appellants should try another of Appellees' "remedies". Appellees' demurrer was not grounded on choice of remedy, but solely on the trial Court's lack of jurisdiction to afford any judicial remedy to Appellants on the basis of the constitutional immunity provision. *In both the previous declaratory judgment proceeding and in this mandamus proceeding, the trial Court has held Appellants have no remedy whatsoever.*

Appellees contend that effective July 1, 1967, with the creation of the "Court Of Claims" (Chap. 14, Art. 2, Code of West Virginia, 1931, as amended by Enrolled Senate Bill 332, West Virginia Legislature, 1967), Appellants can now present their claim to such "Court". This is patently an *ad hoc* argument to try to again avoid this Court's jurisdiction. The newly established "Court Of Claims" *is not a judicial body.* It is not a part of the judicial branch of the state government, *but is simply an advisory body to the Legislature.* It considers and advises the Legislature on claims which the Legislature *might* deem moral obligations. *There is no appeal from the "Court's" advice to the Legislature or the Legislature's action or lack of action on such advice.* Appellees recognize its lack of effectiveness with their statement that "the Court Of Claims findings are not binding on the Legislature". (Motion To Dismiss Appeal, p. 5).

Appellees now say that it is the only "remedy" which the State has provided in such a case as at bar. We submit that it *is no remedy at all*, and that it is the lack of effective

State remedy, *by reason of the application of the constitutional immunity provision*, as has already been twice patently determined by the State judiciary, which is the gist of this appeal.

Appellees' suggestion is that Appellants may pursue their claim solely as a *moral obligation* of the State, and not as a *legal right*. It should be noted that the statute relating to claims before the "Court Of Claims" expressly excludes any claim:

> "5. With respect to which a proceeding may be maintained against the state by or on behalf of the claimant in the courts of the state".

Thus, all other considerations aside, it is apparent that Appellees' suggestion begs the question as to whether Appellants should be provided a judicial forum in which to establish and enforce their rights, for by the very terms of the statute, the procedure cannot be availed of if a judicial remedy is proper.

This statute provides for the presentation of a claim to the "Court Of Claims" to the end that it *may, in its discretion*, recommend to the Legislature that such claim be recognized as a *moral* obligation of the State and for which the Legislature *may, in its discretion*, make an appropriation for its satisfaction, on the basis of the complete absence of any judicially cognizable right.

It has been held insofar as Federal officials are concerned, that in the event of abuse of power of office, a claimant will not be relegated to a court of claims. *Land* v. *Dollar*, 330 U.S. 731, 738. This is especially true in cases such as at bar, for constitutional rights are peculiarly within the sphere of judicial protection. The Constitution which guarantees Appellants' rights, likewise insures them the privilege of having those rights *judicially protected*. *Lawrence* v. *State Tax Comm.*, 286 U.S. 276.

What Appellees are in essence suggesting, is that Appellants *be denied the judicial forum* and forced to submit the protection of their property and their constitutional rights to the *whim and caprice of the legislative political arena from which there can be no appeal. It is a cul de sac.*

Appellants' constitutional rights of due process and protection of their property against public use without compensation, are not to be so lightly treated. A recommendation by a "Court of Claims", in its discretion to be *made or denied*, for a Legislative gratuity, in its discretion to be *given or withheld*, by its inherent limitation, is not and cannot be due process of law. The Rule Of Men as expressed in legislative discretion cannot be substituted for the Rule Of Law guaranteed by the principles of due process.

CONCLUSION

Probable jurisdiction should be noted; the judgment of the trial Court reversed; and this Court should enter, or direct the trial Court to enter, an order compelling the Appellees to institute an eminent domain proceeding to acquire Appellants' property as sought in the mandamus petition.

July 3, 1967

Respectfully submitted,

CARNEY M. LAYNE
638 Fifth Avenue
Huntington, West Virginia

CHARLES W. YEAGER
606 Kanawha Valley Building
Charleston, West Virginia

JAMES W. ST. CLAIR
523 Seventh Street
Huntington, West Virginia
Attorneys for Appellants